Tawin Industries (M) Sdn Bhd v FEC Cables (M) Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–35 OF 2004
LOW HOP BING J
4 NOVEMBER 2004

Civil Procedure — Transfer of action — From one High Court to another — Application to transfer matter from Melaka High Court to Shah Alam High Court — Unconditional appearance — Forum conveniens — Whether application ought to be allowed

Civil Procedure — Appearance — Unconditional appearance — Effect on application for transfer of proceedings — Right to challenge jurisdiction of court — Whether waived

Civil Procedure — Jurisdiction — Forum conveniens — Principles applicable

This is the defendant's application to transfer the plaintiff's action for goods sold and delivered, from the High Court of Malaya at Melaka to the High Court of Malaya at Shah Alam. The defendant contended that the dispute arose in Shah Alam and the facts of the case also took place there. The plaintiff, on the other contended that the defendant had admitted the debt due and owing to the plaintiff in the plaintiff's factory in Melaka. The issues for consideration were: (a) whether the defendant was entitled to challenge the jurisdiction of the court despite the filing of unconditional appearance; and (b) whether the defendant established facts related to the doctrine of *forum conveniens*.

Held, dismissing the application:

(1) The defendant's filing of unconditional appearance gave rise to the defendant's submission to the jurisdiction of the High Court of Malaya at Melaka, and so the defendant has waived his right to challenge the jurisdiction of this court, notwithstanding the defendant's conduct in filing this application which is in effect mounting a challenge based on jurisdiction. Hence, the defendant's application was without any foundation (see para 13).

(2) The defendant's application and the affidavit in support had not made any reference to the doctrine of *forum conveniens*, nor was there any fact or circumstance to support the application of this doctrine. It is evident from the plaintiff's uncontroverted affidavit in reply that the plaintiff's registered address is in Melaka, which was where the defendant had ordered the goods and where the payments for were to be made. On the facts, there can be no doubt that the High Court of Malaya at Melaka is the *forum conveniens* to hear and determine the plaintiff's action herein (see paras 29 and 30).

[**Bahasa Malaysia summary**

Ini adalah permohonan defendan untuk satu perintah untuk meminda tindakan plaintif bagi barang-barang dijual dan dihantar-serah, dari Mahkamah Tinggi Malaya di Melaka ke Mahkamah Tinggi Malaya di Shah Alam. Defendan menegaskan bahawa pertelingkahan adalah bermula di Shah Alam dan fakta kes juga adalah bermula di sana. Plaintif pula menegaskan bahawa defendan telah mengakui jumlah hutang yang masih tertunggak kepada plaintif di kilangnya di Melaka. Isu-isu untuk dipertimbangkan adalah: (a) sama ada defendan berhak untuk mencabar bidang kuasa mahkamah meskipun hanya memfailkan kehadiran tidak bersyarat; dan (b) sama ada defendan telah membuktikan fakta-fakta yang berkaitan dengan doktrin *forum conveniens*.

Diputuskan, menolak permohonan tersebut:

(1) Tindakan defendan memfailkan kehadiran tidak bersyarat menyebabkan defendan telah pun memilih bidang kuasa Mahkamah Tinggi Malaya di Melaka, dengan demikian defendan telah pun mengetepikan haknya untuk mencabar bidang kuasa mahkamah ini, sungguhpun pemfailan permohonan ini terjumlah kepada pencabaran kepada bidang kuasa. Oleh yang demikian, permohonan defendan ini adalah tidak berasas (lihat perenggan 13).

(2) Permohonan dan afidavit sokongan defendan langsung tidak membuat sebarang rujukan kepada doktrin *forum conveniens*, malah juga tidak terdapat sebarang fakta atau keadaan untuk menyokong permohonan doktrin ini. Adalah bukti yang tidak dapat dinafikan menerusi afidavit jawapan plaintif bahawa alamat berdaftar plaintif adalah di Melaka, di mana defendan telah memesan barang-barang dan juga di mana bayaran tersebut perlu dibayar. Daripada fakta, tidak terdapat sebarang keraguan bahawa Mahkamah Tinggi Malaya di Melaka adalah merupakan *forum conveniens* untuk mendengar dan memutuskan tindakan plaintif ini (lihat perenggan 29 dan 30).]

Notes

For cases on conditional appearance, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1268–1274.

For cases on forum conveniens, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3715–3720.

For *forum non conveniens* generally, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.6-083].

For entry of appearances generally, see 1 (2002 Reissue) *Halsbury's Laws of Malaysia* paras [10.2-094]–[10.2-103].

Cases referred to

Bank Bumiputra Malaysia Berhad v Melewar Holdings Sdn Bhd & 4 Ors [1990] 1 CLJ 1246 (refd)

Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40 (refd)
Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors [2001] 1 MLJ 81 (refd)
Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor And Another Appeal [1995] 3 MLJ 472 (folld)
EG Tan & Co (Pte) (in liquidation) v Tan Chong San [1993] 1 MLJ 256 (folld)
Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112 (folld)
Megarina Sdn Bhd v Enersafe Sdn Bhd [2002] 2 MLJ 180 (refd)
Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)
The 'Avro International' The 'Avro Venture' 'Avro International' (Owners Of) v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(a), (b), (c), (d)

Yoong How Vey (Chee Siah Le Kee & Partners) for the plaintiff.
Wan Muhammad Amin bin Wan Yahya (Zainal Abidin & Co) for the defendant.

LOW HOP BING J:

I APPLICATION

[1] Vide application by way of summons in chambers in encl 8 filed by the defendant on 6 May 2004, the defendant seeks an order, *inter alia*, to transfer this action to the High Court of Malaya at Shah Alam, on the grounds that:

(i) the defendant's registered address is at 13-1, Jalan Cahaya 14, Taman Cahaya, Ampang 68000 Selangor and business address is at Lot 9, Persiaran Raja Muda, Section 16, 47600 Shah Alam;

(ii) the action arose in Shah Alam; and

(iii) the facts of the case took place in Shah Alam.

II FACTUAL BACKGROUND

[2] In response to the plaintiff's service of the writ and statement of claim on the defendant, an unconditional appearance in encl 3 was filed by the defendant on 22 March 2004. The defendant's affidavit in support averred that the plaintiff's claim against the defendant is for goods sold and delivered to the defendant at the defendant's premises in Shah Alam, to which invoices and delivery orders were addressed and sent; and that the dispute arose in Shah Alam.

[3] The plaintiff's affidavit in reply stated that the dispute did not arise in Shah Alam, as the defendant had on 20 October 2003 in the plaintiff's factory in Melaka admitted the debt in the sum of RM1,286,814.54 due and owing to the plaintiff ('the debt'). On that date, the defendant through its chief operating

officer Ithnin bin Mohamed, its technical and development manager Jaafar Noor, its marketing manager John Goh and its commercial manager Albert AL Tan attended the meeting with the plaintiff's assistant manager Gan Seng Hock and general manager Yeoh Chin Kiang in the plaintiff's factory in Melaka, wherein Ithnin bin Mohamad had clearly admitted the debt to the plaintiff and proposed payment of the debt in five instalments by way of five cheques as follows:

Date of cheque		Sum (RM)
2003	October 31	150,016.74
	November 30	289,985.34
	December 30	309,037.73
2004	January 30	318,908.04
	February 28	218,867.09

[4] Pursuant to the defendant's proposal for payment, the defendant had given five cheques, which were apparently not honoured by the defendant.

[5] The defendant did not reply to the averments in the plaintiff's said affidavit.

III EFFECT OF FILING UNCONDITIONAL APPEARANCE

[6] Mr Yoong How Vey, counsel for the plaintiff, informed the court that since the defendant has filed an unconditional appearance, the defendant has waived its right to challenge the jurisdiction of the High Court of Malaya at Melaka. Support was sought in *The 'Avro International' The 'Avro Venture' 'Avro International' (Owners Of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 Singapore CA; *EG Tan & Co (Pte) (in liquidation) v Tan Chong San* [1993] 1 MLJ 256 HC; and *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor And Another Appeal* [1995] 3 MLJ 472 FC.

[7] The response of learned counsel for the defendant Mr Wan Muhammad Amin bin Wan Yahya is that there is no authority to the effect that the defendant must file a conditional appearance for the purpose of making an application for the transfer of proceedings. He added that *The Avro*, *supra*, and *Development and Commercial Bank*, *supra*, are not applicable as they did not concern an application for the transfer of an action. He added *EG Tan & Co*, *supra*, is also not applicable as the defendant herein is not challenging the jurisdiction of this court but is instead relying on the basis of *forum conveniens* as enunciated in *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 HC.

[8] At this juncture, it is necessary for me to have a re-look at the defendant's application, particularly line 4 of the summons in chambers which expressly says that the application was made '*menurut s 23(1) Akta Mahkamah Kehakiman 1964 dan/atau di bawah kuasa-kuasa sedia ada Mahkamah*'(pursuant to s 23(1) of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of the court).

[9] For brevity and convenience, all references hereinafter to a section or a rule is a reference to that section in the Courts of Judicature Act 1964 and the Rules of the High Court 1980 respectively.

[10] The defendant's submission made no mention of the inherent jurisdiction of the court, in which case I am of the view that the defendant is no longer desirous of pursuing this ground which therefore evaporates by way of self-elimination.

[11] Although the defendant's application, as alluded to above, was expressly made pursuant to s 23(l), the submission presented for the defendant seems to have abandoned the very ground that forms the foundation of its application. This submission leaves me with no alternative but to conclude that the substratum of the defendant's application has been effectively removed, again by way of the defendant's own process of self-elimination.

[12] However, *ex abundante cautela*, the ambivalent nature of the defendant's submission makes it necessary for me to consider the legal effect of defendant's filing of unconditional appearance.

[13] In my view, the defendant's filing of unconditional appearance gives rise to the defendant's submission to the jurisdiction of the High Court of Malaya at Melaka and so the defendant has waived his right to challenge the jurisdiction of this court, notwithstanding the defendant's conduct in filing this application which is in effect mounting a challenge based on jurisdiction. The defendant cannot be allowed to blow hot and cold or approbate and reprobate (per Peh Swee Chin FCJ in *Development and Commercial Bank*, *supra*).

[14] In *EG Tan*, *supra*, the defendant who has entered an unconditional appearance made an application to seek leave to withdraw it and to file a conditional appearance, in addition to an order to set aside or stay the proceedings on the ground that the High Court of Malaya at Kuala Lumpur is not the proper or convenient forum.

[15] In dismissing the application, Abdul Malek Ahmad J (now PCA) applied the principles enunciated by the Court of Appeal (Singapore) in *The 'Avro'*, *supra*, and explained at p 262 D–G that the effect of entering an unconditional appearance is twofold ie it waives any irregularity of the writ or its service, and the defendant is considered to have submitted to the jurisdiction of the court, and that a defendant who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance.

[16] While it is true that *EG Tan*, *supra*, and *The 'Avro', supra*, did not concern any application for transfer of proceedings from one branch of the High Court to another, I am of the view that the above principles are illuminating which I hereby apply. I therefore hold that the defendant's entry of unconditional appearance herein has evinced a wish on the part of the defendant not to challenge the jurisdiction of this court based on s 23(l)(a), (b) or (c) despite the express inclusion in the defendant's application. It is clear that the defendant's application is without any foundation.

IV FORUM CONVENIENS

[17] *Forum conveniens* is the next and final contention advanced for the defendant, who sought repeated support in s 23(l)(a), (b) or (c). *Bank Bumiputra Malaysia Berhad v Melewar Holdings Sdn Bhd & 4 Ors* [1990] 1 CLJ 1246, 1247; *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268; *Megarina Sdn Bhd v Enersafe Sdn Bhd* [2002] 2 MLJ 180; *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40, 47; and *Cita Marine Sdn Bhd v Progressive Insurance Bhd & Ors* [2001] 1 MLJ 81 were also cited.

[18] For the plaintiff, it was argued that the defendant's submission should only be considered on the basis of *forum conveniens*, or alternatively, the defendant's application should be dismissed on the strength of *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112.

[19] On my part, I shall adopt a comprehensive approach by considering the defendant's application on its merits.

[20] In *Bank Bumiputra*, *supra*, the second and fifth defendants were Petaling Jaya or Selangor residents. They were guarantors to an overdraft facility granted to the first defendant by the plaintiff's Kuala Pilah branch which has a registered office in Kuala Lumpur. The loan was applied for and obtained in Kuala Pilah. The land charged as security to the plaintiff was located in Kuala Pilah. The defendants applied to transfer proceedings from the High Court of Malaya at Seremban to the High Court of Malaya at Kuala Lumpur pursuant to s 23. The issue was where the cause of action arose. Mustapha Bin Hussain J (as he then was) held that the breach of contract ie the failure of the defendants in the outstanding sums occurred at Kuala Pilah, and that was the place the cause of action arose, thereby superseding the defendants' residential qualification under s 23(l)(b).

[21] In my view, the decision in *Bank Bumiputra*, *supra*, militates against the contention for the defendant.

[22] In *Megarina*, supra, the plaintiff's claim against the defendant was for an outstanding sum for goods sold and delivered by the plaintiff to the defendant in Terengganu. The defendant had a business address in Terengganu but resided in Sarawak. The defendant applied to strike out the plaintiff's

claim under O 18 r 19 on the ground that the High Court of Malaya had no jurisdiction to entertain the plaintiff's claim. Nik Hashim J (now JCA) held that s 23(l)(a), (b), (c) or (d) should be construed disjunctively and that both the High Court of Malaya and the High Court of Sabah and Sarawak have jurisdiction to hear the plaintiff's case. In my view, this decision does not buttress the defendant's application herein.

[23] *Sova*, *supra*, concerned the plaintiff's application for certain reliefs under O 81. At the hearing of that application, the issue of *forum conveniens* was raised. After concluding that the cause of action arose in Penang and that the parties have their place of business in Kuala Lumpur, Lim Beng Choon J (as he then was) held that the High Court of Malaya at Alor Star should not deal with the matter and asked the defendant to apply to transfer the proceedings to the Penang or Kuala Lumpur High Court.

[24] In my view, the doctrine of *forum conveniens* called for the matter to be heard by a court which was more accessible and appropriate in the interest of all parties and for the ends of justice, notwithstanding that other courts also had territorial jurisdiction pursuant to s 23(l) (see also *Bank Utama*, *supra*, per Vincent Ng J and *Malacca Securities*, *supra,* at pp 119C to 120B by Augustine Paul J (now JCA); *Sova*, *supra*, per Lim Beng Choon J (as he then was).

[25] I shall now consider *Malacca Securities*, *supra*. There the plaintiff was a licensed stockbroker with its registered office in Melaka. The defendant operated an account with the plaintiff and used its services for transacting in shares. The defendant's last known address was in Kuala Lumpur. The plaintiff filed an action against the defendant in the High Court of Malaya at Melaka. The defendant filed an application to have the action transferred to the High Court of Malaya at Kuala Lumpur based on s 23(l)(a) or (b), contending that the trial of the action in Melaka would inconvenience him and cause him a greater expenditure as he and his witnesses were from Kuala Lumpur.

[26] Augustine Paul J (now JCA) dismissed the application, holding, *inter alia*, that:

(1) The plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state, even if the defendant was correct in his submission that the cause of action arose in Kuala Lumpur coupled with the fact that he resides there also;

(2) The critical issue for determination is whether the court is the *forum conveniens* to hear the dispute between the parties notwithstanding the fact that it has jurisdiction to do so. A court which has jurisdiction to hear a case can lawfully decline to exercise its jurisdiction on the ground that the case must be heard by a more accessible court;

(3) With regard to the accrual of the cause of action in contract cases, it is deemed to have occurred at the place where the breach took place. In a contract for the payment of money, the breach occurs when there is a failure to pay the

A sum promised, as a 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint. The breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place. Where there is no agreement as to the place where the payment should be made, then the payments should be made at the place where the plaintiff lives.

B **[27]** On the facts, the learned judge held that the plaintiff's cause of action arose in Melaka and hence dismissed the defendant's application to transfer the proceedings from Melaka to Kuala Lumpur. I agree with these principles which I apply to this application.

C **[28]** Reverting to the facts of the instant application, I am of the view that the defendant relying on the doctrine of *forum conveniens* bears the burden of proving the accrual of the plaintiff's cause of action in Shah Alam and the suitability or appropriateness of the High Court of Malaya at Shah Alam in the interest of all the parties and for the end of justice.

D **[29]** Upon a proper perusal of the defendant's application in encl 8 and the affidavit in support in encl 7, it is my specific finding that neither of these two enclosures had ever made any reference to this doctrine, nor was there any fact or circumstance to support the application of this doctrine.

[30] On the contrary, it is evident from the plaintiff's uncontroverted affidavit
E in reply that the plaintiff's registered address is in Melaka, from where the defendant had ordered the goods, the payments for which were to be made in Melaka where the defendant's four key management personnel have had a meeting with the plaintiff's assistant manager, resulting in the agreement by the defendant to pay the debt in five cheques which the defendant had
F apparently failed to honour. On the facts, there can be no doubt in my mind that the High Court of Malaya at Melaka is the *forum conveniens* to hear and determine the plaintiff's action herein.

V CONCLUSION

G **[31]** On the foregoing grounds, it is abundantly clear to me that the defendant's application is wholly devoid of merits and is hereby dismissed with costs.

Application dismissed.

H

Reported by Sugandra Rao

I